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(2)

Division Bench (Jabalpur)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR M.P.

Criminal Appeal No. 1814 of 2000.

APPELLANT IN JAIL :: SALAU @ SALAUDDIN S/O ABDUL QUADIR, aged about 38 years, resident of Mominpura, Ambikapur, District Sarguja.

(Versus)

RESPONDENT :: THE STATE OF MADHYA PRADESH, through Police Station Ambikapur.

CRIMINAL APPEAL UNDER SECTION 374(II) OF THE CODE OF CRIMINAL PROCEDURE.

3513

18/12/2000

Shri V. Yadav Advocate

R.A.E

(21)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No. 1814 OF 2000

Salau alias Salauddin

Vs.

State of M.P.

JUDGEMENT FOR CONSIDERATION

Sd/-
Dhirendra Mishra
Judge

HON'BLE SHRI L.C.BHADOO ,J.

Sd/-
L.C. Bhadoo
Judge

POST FOR JUDGMENT ON 1 FEBRUARY 2006

Sd/-
DHIRENDRA MISHRA
Judge

(22)

HIGH COURT OF CHHATTISGARH: BILASPUR

Division Bench: Hon'ble Shri L.C.Bhadoo
& Hon'ble Shri Dhirendra Mishra, JJ

Criminal Appeal No. 1814 of 2000

Appellant : **Salau @ Salauddin**

Vs.

Respondent : **State of Madhya Pradesh**

Appellant by Shri A.K.Prasad, Advocate.
State by Shri Ashish Shukla, Additional Public Prosecutor with Shri M.P.S.Bhatia, Panel Lawyer.

JUDGMENT
(Delivered on 01/02 /2006)

Per Dhirendra Mishra, J

The appellant has preferred this criminal appeal under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction and order of sentence dated 19.06.2000 passed in Sessions Trial No. 241/89 by the learned First Additional Sessions Judge, Ambikapur (Surguja).

2. Case of the prosecution, in brief, is that on the basis of information given by complainant Vimla Bai on 16.06.1988 at about 9.40 a.m. in the Government District Hospital (Female Surgical Ward), Ambikapur Dehati Nalishi of Ex.P/3 was registered by Police Station-Ambikapur under Section 307 of the Indian Penal Code wherein Vimla Bai has stated that on 15.06.1988 at about 11.30 hours in the night appellant sprinkled kerosene oil from the burning oil lamp over her body and thereafter threw the lamp on her, as a result of which her maxi caught fire and on hearing her cries other members of the family present in

the house came to her room and extinguished the fire. The neighbours also came to the place of incident. She narrated the incident to them also and thereafter her brother Rajendra took her on riksha and admitted in the Government Hospital. Due to burning her hair, forehead, both the eyes, nose, mouth, neck, both the ears, cheeks, both the shoulders, both the hands, breast, stomach and the left portion of the back had burnt. After setting her in fire the appellant had fled away. Complainant Vimla Bai was examined by the doctor after admission in the Hospital on 16.06.1988 who gave his opinion that she had sustained 50-60% burn injury because of flame. Her dying declaration of Ex.P/12 was recorded by M.R.Gayakwad (P.W.14), Nayab Tehsildar on 17.06.1988 in the Hospital at about 12.30 hours in the presence of Dr. P.K.Banerjee (P.W.11). During investigation oil lamp made of tin container of oil paint and burnt hair were seized from the house of the complainant on 16.06.1988 vide Ex.P/1. The partially burnt maxi and old petticoat of the complainant were also seized vide Ex.P/2. Vide merg intimation dated 19.07.1988 of Ex.P/4 whereby one Angatram informed that complainant Vimla Bai who was admitted in the Hospital on 16.06.1988 at about 12.20 hours after mid night had expired. The inquest was performed over the body of deceased Vimla Bai in the presence of witnesses. Body was sent for postmortem examination to District Hospital, Ambikapur. Postmortem was performed by the team of doctors namely Dr. R.K.Bajaj and Dr. Ashok Jain and they submitted their report (Ex.P/11). As per the postmortem report the cause of death is shock because of secondary infection due to burn. Bed head ticket of the deceased was seized vide seizure memo of Ex.P/8. Spot map of Ex.P/13 was prepared by the Revenue Inspector Hanuman Singh (P.W.8). The appellant was arrested on 20.07.1988. Charge sheet was filed against the appellant in the Court of Chief Judicial Magistrate, Ambikapur who in turn committed the case to the Court of Sessions Judge, Ambikapur and the same was received on transfer by the learned Additional Sessions Judge for trial. Charge under

Section 302 of the IPC was framed. The appellant abjured his guilt and stated that he is innocent and has been falsely implicated in the crime.

3. The appellant was on bail, however, warrant of arrest was issued against him on 11.05.1991 after canceling the bail bonds furnished by him. The appellant was declared absconder on 09.09.1998 and permanent warrant of arrest was ordered to be issued. Thereafter statements of witnesses were recorded on 19.09.1998. The appellant was arrested in execution of non-bailable warrant and produced before the trial Court on 10.05.1999. The witnesses were cross-examined thereafter and statement of the accused was recorded under Section 313 of the Cr.P.C. The appellant denied the circumstances appearing against him in the prosecution case and he examined three defence witnesses namely Dr. M.H.Firdoushi-Surgical Specialist (D.W.1), Santara-elder sister of the deceased (D.W.2) and Rajendra-brother of the deceased (D.W.3). After hearing the parties, learned trial court held the appellant guilty under Section 302 of the IPC and sentenced him as described above.

4. The homicidal death of the deceased is not in dispute.

5. Apart from this taking into consideration the First Information Report of Ex.P/3 lodged by the deceased herself, her dying declaration of Ex.P/12, M.L.C. report of Ex.P/9 in which it is mentioned that the deceased sustained 50-60% burn injury caused by flame and further considering the opinion of the doctors performing autopsy who have stated that cause of death is due to shock because of secondary infection due to burn, it is held that the death of the deceased was homicidal in nature.

6. Learned counsel for the appellant submits that there is no eyewitness to the incident and the appellant is convicted on the basis of alleged dying declaration which is a suspicious document. In support of his contention he further argues that P.W.1-father of the deceased, P.W.3-step-mother of the deceased, P.W.4-Urmila and P.W.5

Sukhliya Bai who were present at the time of incident in the house have categorically stated that Vimla Bai did not disclose the name of the appellant after the incident and the report was in fact lodged by Santara Bai (D.W.2) as Vimla Bai was not in a position to speak. However, learned trial Court ignoring the cross-examination of the witnesses Bechan Ram (P.W.1), Dasmatiya (P.W.3), Urmila (P.W.4) and Sukliya Bai (P.W.5), has wrongly arrived at the conclusion that at the time of incident the appellant was residing with the deceased in her house and further relying upon the dying declaration has held the appellant guilty which is contrary to law. From perusal of the statements of witnesses it appears that the statements of the above witnesses were initially recorded in the month of September 1998 while the accused was absconding and all the witnesses namely P.W. 1, P.W. 3, P.W. 4 and P.W. 5 had stated that when they reached the place of incident after hearing the cries, Vimla Bai informed them that the appellant has set her in fire after sprinkling kerosene from the burning oil lamp. However, on their cross-examination which was conducted after almost more than one year of their examination-in-chief, they resiled from their statements and have further stated that Vimla Bai did not name the appellant as she was not in a position to speak and the report was lodged by Santara Bai.

Learned counsel for the appellant has assailed the dying declaration recorded by Nayab Tehsildar on the ground that the same does not bear the thumb impression of the deceased and Dr. P.K. Banerjee who has certified that Vimla Bai was conscious and she was able to depose, has not certified that she was able to understand the questions and was competent to answer the same and as such the dying declaration of Ex.P/12 is a suspicious document and the appellant cannot be held guilty solely on the basis of dying declaration.

7. Learned counsel for the appellant places his reliance in the matter of **Rasheed Beg and others Vs. State of Madhya Pradesh** reported in

AIR 1974 S.C. 332 (V 61 C 65) and submits that dying declaration recorded under suspicious circumstances should not be acted upon without corroborative evidence as possibility of tutoring cannot be ruled out.

8. Further relying upon the judgment reported in **AIR 1999 S.C. 3455** in the matter of **Paparambaka Rosamma and others Vs. State of Andhra Pradesh** submits that stipulation at the end of dying declaration by the doctor to the effect that patient is conscious while recording the statement in itself is not sufficient in the absence of medical certification that the injured was in a fit state of mind at the time of making the declaration and such declaration is unacceptable and cannot be relied upon.

9. On the other hand, learned counsel for the State supports the impugned judgment of the trial Court.

10. We have heard learned counsel for the respective parties.

11. In the matter of Rasheed Beg (supra) dying declaration of 12 years old boy and his statement were recorded when the boy was serious and was loosing consciousness and the dying declaration was recorded when the boy was accompanied by a person who bore enmity with the named accused, therefore the Supreme Court held that it was not safe to fasten the guilt on the basis of such dying declaration without corroborative evidence.

12. So far as the judgment delivered in the matter of Paparambaka Rosamma (supra) is concerned, in the light of Constitution Bench judgment of the Supreme Court in the matter of **Laxman Vs. State of Maharashtra** reported in **(2002) 6 S.C.C. 710,** it is no longer a good law as in the said judgment it has been held that where the evidence was available to this effect that the declarant was in a fit state of mind to make declaration, mere absence of doctor's certification as to the fitness of the declarant's state of mind would not ipso facto render the

dying declaration unacceptable and absence of doctor's certification as to mental fitness of the declarant is not sine qua non for the credibility of the dying declaration.

13. The Supreme Court in the matter of **K.Ramachandra Reddy and another Vs. The Public Prosecutor** reported in **AIR 1976 S.C. 1994** has held as under;

> *"The dying declaration is undoubtedly admissible under Section 32 and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is proved and voluntary it can be sufficient to found the conviction even without any further corroboration. A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human*

memory and human character. In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. One of the important tests of the reliability of a dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind."

14. Similarly, the Supreme Court in the matter of **Bhola Turha Vs. State of Bihar** reported in **(1998) 9 Supreme Court Cases 15** has held that where the dying declaration is made within a short period of the incident and in which the deceased clearly explaining the circumstances under which he sustained injuries and where no inconsistency is present between the dying declaration and other evidence on record, in such circumstances conviction may be based solely on the dying declaration.

15. From the details enumerated hereinabove it is evident that the incident took place on 15th June 1988. Dehati Nalishi was recorded on 16th June 1988 at the instance of deceased Vimla Bai wherein she mentioned the circumstances under which the incident took place and named the appellant as perpetrator of the offence. Vimla Bai was admitted in the Hospital and her dying declaration (Ex.P/12) was recorded on 17.06.1988 by Nayab Tehsildar (P.W.14). The above dying declaration has been duly proved by Nayab Tehsildar who has

stated in his deposition that he recorded the statement of the injured on 17.06.1988 after doctor certified that she was completely conscious and able to make statement. He has also stated that the statement was recorded in the presence of the doctor and he also recorded the questions put to her and answers thereof as given by Vimla Bai. He has further stated that Vimla Bai was fully conscious, however, she had extensively burnt and therefore, she was not in a position to sign or put her thumb impression as fingers of both of her hands were burnt. In the cross-examination he has stated that he had gone there to record the dying declaration after authorization by the superior officers and he was not aware as to who lodged the First Information Report or he did not recognize the injured woman. He had denied the suggestion that he was brought by the police to record the dying declaration or he was accompanied by the police. He has further denied the suggestion that Vimla Bai was unconscious or that the statement was recorded in the presence of mother of Vimla Bai and her brothers. Dr. P.K. Banerjee who has been examined as P.W. 11 has also stated that the Vimla Bai was fully conscious and able to give statement at that time as he had examined her before recording the statement and found her fully conscious and able to depose. He has also proved the entries made by him in Ex.P/12. He has categorically opined that the level of consciousness of the patient with 50-60% burn injury may also be fit.

16. Thus from the deposition of P.W.14 and P.W.11 who are Nayab Tehsildar and doctor respectively and as such independent witnesses, the dying declaration of the deceased recorded on 17.06.1988 is duly established. The defence has not been able to show any infirmity in the statements of the above witnesses in order to discredit their version.

17. On the other hand, D.W.1 M.H. Firdousi, Surgical Specialist has stated in paragraph 2 of his cross-examination that in burn cases a

person having 80-90% burn injury may also remain conscious and thus fortified the opinion of P.W.11.

18. In view of the above, we are of the considered opinion that dying declaration of deceased Vimla Bai recorded on 17.06.1988 has been duly proved by the doctor and the Nayab Tehsildar and documents of Ex.P/12 has been recorded as per declaration of the deceased. The argument advanced by learned counsel for the appellant is that P.W. 1, P.W. 3, P.W.4 and P.W.5 who are father, step-mother, brother and sister of the deceased respectively have categorically stated in their cross-examinations that the deceased was not in a position to state anything as she had sustained severe burn injuries and she did not disclose that she was set in fire by the appellant and further that the FIR was in fact lodged by Santara Bai and therefore, in the light of the statements of the above witnesses who were present at the time of incident in the house, brought the deceased and admitted her in the Hospital, the dying declaration becomes a suspicious document and the same cannot be acted upon.

19. We are unable to accept the above argument because from perusal of the statements of these witnesses it is evident that they initially stated in their examination-in-chief that Vimla Bai informed that the appellant set her in fire by sprinkling kerosene from the burning oil lamp and thereafter threw the lamp on her and fled from the scene of occurrence and subsequently they resiled from their earlier statements in the cross-examination. In the aforesaid circumstances, the appellant cannot be extended any benefit on the basis of statements of these witnesses.

20. So far as the contention of P.W. 1 that the report was in fact lodged by Santar Bai as the deceased was not in a position to speak is concerned, the contention of this witness does not get support from the statement of Santara Bai who has been examined as P.W. 2 and stated that in fact she lodged the report and for the first time she

stated in the Court that her sister sustained burn injuries because of bursting of stove and the death was in fact accidental. From cross-examination of this witness it is evident that she was not present at the time of incident, she did not go to get her sister admitted in the Hospital and she had only once visited Vimla Bai while she was admitted in the Hospital. From perusal of cross-examination of other witnesses it would be evident that none of the witnesses has stated in their statements that Vimla Bai sustained injuries because of bursting of stove. On the contrary, P.W. 4 Urmila- sister-in-law of the deceased has stated in paragraph-2 of her statement that she resides beside the house of Vimla Bai and after hearing the noise she went to the house of Vimla Bai and found her unconscious and burnt and stove war burning in her house.

21. Similarly D.W. 3 Rajendra-brother of deceased Vimla Bai has also stated that when he went to the Hospital he saw that his sister was not in a fit condition to speak. However, he has admitted that he only once visited his sister in the Hospital and thereafter he never went to the Hospital. In the cross-examination he has stated that on the date of incident he was not in his home as he had gone to Sitapur and came to know about the incident on the following day and thereafter, he went to Ambikapur and saw the deceased in the Hospital at about 1.30 p.m.

22. Thus on close scrutiny of the statements of P.W. 1, P.W. 3, P.W. 4, P.W. 5 and D.W. 2 and D.W.3 who are close relatives of the deceased, we are of the considered opinion that they are not the witnesses of truth and for some reason they are concealing the facts, therefore, no benefit can be extended to the appellant on the basis of statements of such witnesses.

23. We have already held that the First Information Report was lodged by the deceased immediately after the incident vide Ex.P/3 narrating the circumstances under which she was set in fire by the appellant and we

have further held that the dying declaration of Ex.P/11 is trustworthy as the same has been recorded by a competent authority after certification of mental fitness of the declarant and the Court below has rightly held the appellant guilty on the basis of above dying declaration and other circumstances narrated by it in paragraph-22 of the judgment.

24. On the basis of aforesaid analysis, we are of the opinion that there is no illegality or infirmity in the impugned judgment passed by learned Additional Sessions Judge whereby the appellant has been held guilt of the offence under Section 302 of the IPC. Therefore, the appeal being devoid of merits deserves to be dismissed and it is accordingly dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Dhirendra Mishra
Judge